



Republican Policy Committee

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Suspect Provisions in the Clinton/Daschle Anti-terrorism Bill, S. 761

The Senate may soon take up consideration of a substitute to S. 735, the Comprehensive Terrorism Prevention Act of 1995. (For a summary of the provisions of S. 735, see RPC's *Legislative Notice* No. 19 of May 25, 1995).

However, when S. 735 comes to the floor, the Administration will support an alternative bill, introduced by Minority Leader Daschle on behalf of President Clinton. The Clinton/Daschle bill contains no provisions for reforming habeas corpus. In addition, S. 761 includes provisions affecting three controversial matters:

- **Posse comitatus**, which refers to the use of the military for domestic police functions;
- **"Roving wiretaps,"** which refers to electronic surveillance specific to a person who may be using multiple telephones, as opposed to tapping a single phone line; and
- **"Temporary emergency wiretap authority" for "domestic terrorism."**

Because public discussion of proposed anti-terrorism legislation does not always distinguish adequately between the two proposals, this paper is designed to clarify any confusion that may exist. *The provisions discussed below are found only in S. 761, the Clinton/Daschle bill; they are not found in S. 735.*

1. **Posse Comitatus.** The Posse Comitatus Act of 1878 (18 U.S.C. 1385), despite minor subsequent amendments, essentially prohibits the use of the U.S. armed forces for domestic police purposes. However, two sections of S. 761 appear to substantially erode that longstanding statutory prohibition:

- Under the provision dealing with terrorism transcending national boundaries (Sec. 101(a):

"(f) INVESTIGATIVE RESPONSIBILITY. — Violations of this section shall be investigated by the Attorney General. Assistance may be requested from

any federal, state, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding." (*emphasis added.*)

[NOTE: In Judiciary Committee proceedings, supporters of S. 761 indicated their willingness to remove the foregoing language, but it remains in the latest version of the bill.]

- **Sec. 811. Permission to Request Military Assistance with Respect to Offenses Involving Chemical and Biological Weapons:**

Under this section, the Attorney General is authorized, "notwithstanding any other provision of law" — i.e., the Posse Comitatus Act — to request technical assistance from the Defense Department in circumstances involving chemical and biological weapons. This expands upon an existing exception to the posse comitatus prohibition with regard to nuclear weapons.

2. **"Roving Wiretaps."** Under existing law, courts generally approve wiretaps specifying the telephone line — a certain telephone number — to be monitored. An exception can be granted where the criminal suspect who is the object of the wiretap makes use of numerous lines — a car phone, pay phones, etc. — with the intent to evade telephone surveillance. In such cases, courts may approve a "roving," or "multipoint," tap, which allows federal authorities to listen to the suspect on any line he is currently using while in actual visual surveillance. However, intent is a key requirement in authorizing such taps — they can not be issued in cases where the suspect just happens to use multiple phones in a manner that makes single-line monitoring difficult. Sec. 808 of the Clinton/Daschle bill removes the requirement of intent and substitutes a standard of practicality.

3. **Temporary Emergency Wiretap Authority for Domestic Terrorism.** Sec. 807 of the Clinton/Daschle bill amends an existing provision of law to authorize (in the language of that provision as modified) the interception of wire, oral, or electronic communication in an emergency situation involving —

"conspiratorial activities characteristic of organized crime or domestic terrorism or international terrorism . . . "

"Domestic terrorism," as broadly defined under Sec. 807, involves violent and dangerous acts that already constitute violations of federal and state law. However, it is not clear what might constitute "conspiratorial activities characteristic of domestic terrorism."